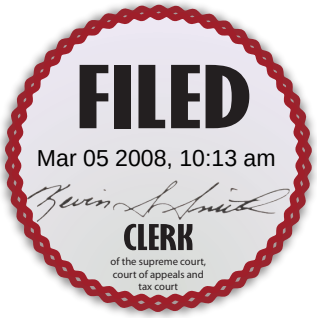

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IN THE COURT OF APPEALS OF INDIANA

TROY EARLYWINE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0710-CR-563
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0411-FB-534

March 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Troy Earlywine appeals the revocation of his probation. Earlywine raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to revoke Earlywine's probation; and

II. Whether the trial court abused its discretion by ordering Earlywine to serve his suspended sentence.

We affirm.

The relevant facts follow. On November 1, 2004, Earlywine was charged with sexual misconduct with a minor as a class B felony[1] and contributing to the delinquency of a minor as a class A misdemeanor.[2] On September 7, 2005, Earlywine pleaded guilty to a lesser included offense of sexual misconduct with a minor as a class D felony,[3] and the State dismissed the remaining charge. The trial court sentenced Earlywine to the Indiana Department of Correction for a term of thirty-six months with thirty months suspended to probation.

On November 9, 2006, the State filed a Notice of Violation of Probation alleging that Earlywine had violated the conditions of his probation by submitting a urine specimen that tested positive for the presence of Cannabinoids, "Oxazipan," and Temazepam. Appellant's Appendix at 18. On January 8, 2007, Earlywine admitted the

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[1] Ind. Code § 35-42-4-9 (2004) (subsequently amended by Pub. L. No. 216-2007, § 45 (eff. July 1, 2007)).

[2] Ind. Code § 35-46-1-8 (2004) (subsequently amended by Pub. L. No. 2-2005, § 126 (eff. April 25, 2005); Pub. L. No. 1-2006, § 533 (eff. Mar. 24, 2006); and Pub. L. No. 151-2006, § 18 (eff. July 1, 2006)).

[3] Ind. Code § 35-42-4-9 (2004) (subsequently amended by Pub. L. No. 216-2007, § 45 (eff. July 1, 2007)).

violation, and the trial court placed him back on probation. On January 25, 2007, the State filed another Notice of Violation of Probation, which it later amended, alleging that Earlywine had violated the conditions of his probation because he had: (1) failed to attend Thinking for a Change; (2) failed to remain a resident of the Christian Center; (3) submitted a diluted urine specimen; (4) committed a new criminal offense of domestic battery; and (5) knowingly associated with a convicted felon.

At the probation revocation hearing on May 21, 2007, Anderson City Police Officer Caleb McKnight testified that, on March 15, 2007, he was dispatched to the residence of Brittainy Bird on a domestic battery call. When he arrived, Officer McKnight found Earlywine and Bird in a "verbal argument" and observed that Earlywine had scratch marks on the right side of his face and around his shoulder and back and that Bird's nose was swollen and bleeding. Transcript at 47. According to Officer McKnight, Earlywine claimed that, after arguing with Bird, he left "for a couple of hours" and that, upon his return, he asked Bird whether she had taken her medication, "seeing that she was bipolar." Id. at 48. Bird "got[] out of bed and slapped [Earlywine] across the face," and Earlywine called the police. Id. Bird, on the other hand, claimed that Earlywine had come home drunk, grabbed her by the hair and pulled her out of bed, that she slapped him in self defense, that Earlywine then hit her, and that her mother had separated them until the police arrived. Because of their conflicting accounts, Officer McKnight arrested them both.

Earlywine and Bird, however, testified that they had been arguing, but that Earlywine did not hit her, although Bird confirmed that Earlywine had been drinking that

night. Bird's mother testified that she heard them "verbally arguing" but denied hearing the "outburst of anyone being injured." Id. at 77.

Bird also admitted that she had been convicted of assisting a criminal as a class D felony in February 2007. She was pregnant but denied that Earlywine was the father. Earlywine also testified that he had been "hanging out" with William Everage, a convicted felon he knew from prison and from classes they were taking as convicted sex offenders. Id. at 87. The trial court found that Earlywine had violated the conditions of his probation because: (1) he had associated with felons; (2) he had a "baby on the way" even though he was prohibited as a convicted sex offender from being around children; (3) he had committed domestic battery; and (4) he had consumed alcohol. Appellant's Appendix at 43. Accordingly, the trial court revoked Earlywine's probation and ordered him to serve his suspended sentence of thirty months in the Indiana Department of Correction.

I.

The first issue is whether the evidence is sufficient to revoke Earlywine's probation. Probation is an alternative to commitment in the Department of Correction, and it is at the sole discretion of the trial court. Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (citing Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999)). A defendant is not entitled to serve a sentence in probation. Id. Rather, probation is a "matter of grace" and a "conditional liberty that is a favor, not a right." Id. (quoting Cox, 706 N.E.2d at 549). A revocation hearing is in the nature of a civil proceeding, so the alleged violation need be proven only by a preponderance of the evidence. Id. (quoting Isaac v.

State, 605 N.E.2d 144, 147 (Ind. 1992)). If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of any violation, revocation of probation is appropriate. Id. We neither reweigh the evidence nor judge the credibility of the witnesses. Menifee v. State, 600 N.E.2d 967, 970 (Ind. Ct. App. 1992), clarified on denial of reh'g, 605 N.E.2d 1207 (1993). Evidence of a single probation violation is sufficient to sustain a revocation of probation. Id.

The State need not show that a defendant was convicted of a crime in order for the trial court to revoke probation. Lightcap, 863 N.E.2d at 911. Although an arrest standing alone does not necessarily support a revocation of probation, where there is evidence submitted at the hearing from which the trial court could find that an arrest was reasonable and that there is probable cause for belief that the defendant violated a criminal law, revocation of probation is permitted. Id.

Here, the trial court found four violations. Earlywine does not challenge the trial court's finding that he violated his probation by consuming alcohol. He does, however, appear to challenge the other three violations. As noted above, evidence of a single probation violation is sufficient to sustain a revocation of probation. The State concedes that the finding that Bird was pregnant and that Earlywine is not to be around children was improper.[4] Nevertheless, we conclude that the trial court properly found the two

[4] Earlywine contends, and the State concedes, that the Third Amended Notice of Violation of Probation did not mention that Bird was pregnant and that Earlywine was not to be around children. The due process rights that inure to a probationer at a revocation hearing include written notice of the claimed violations. Isaac, 605 N.E.2d at 148 (citing Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1760 (1973)). Thus, the trial court's reliance on an alleged probation violation concerning which Earlywine did

remaining violations that Earlywine contests and thus hold that the evidence is sufficient to revoke Earlywine's probation. We will address the two contested violations.

Earlywine appears to challenge the trial court's finding that he committed domestic battery. Ind. Code § 35-42-2-1.3 provides that a person who "knowingly or intentionally touches [a domestic partner] in a rude, insolent, or angry manner that results in bodily injury to the [domestic partner]" commits domestic battery as a class A misdemeanor.[5] Here, the State presented evidence that, on March 15, 2007, Earlywine and Bird argued, that Bird scratched Earlywine's face and shoulder, and that Earlywine hit Bird. Officer McKnight testified that Bird's nose was swollen and bleeding when he answered the domestic battery call. Although Earlywine and Bird later testified that Earlywine did not hit her, the trial court found Officer McKnight's testimony more credible, and we cannot reweigh the evidence. Because there was evidence submitted at the probation revocation hearing from which the trial court could find probable cause for the belief that Earlywine committed domestic battery, we conclude that the trial court was permitted to revoke Earlywine's probation based on this violation. See Richeson v. State, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995) (holding that there was sufficient evidence to revoke defendant's probation where there was probable cause to arrest defendant for a drive-by shooting), reh'g denied, trans. denied; see also Menifee, 600 N.E.2d at 970

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not have written notice was improper. We note that the Third Amended Notice of Violation of Probation also did not mention that Earlywine had consumed alcohol.

[5] Earlywine does not dispute the domestic nature of his relationship with Bird.

(holding that the trial court could properly conclude that defendant committed domestic battery, resisted law enforcement, and caused property damage, and that any of these violations warranted revocation of probation).

Earlywine also argues that his association with Everage and Bird, both convicted felons, "was insufficient to revoke his probation." Appellant's Brief at 13. One condition of Earlywine's probation was that he not associate with convicted felons. The State presented evidence, and Earlywine admitted, that he had been "hanging out" with Everage, whom Earlywine knew to be a convicted felon. Transcript at 87. Earlywine also admitted at a hearing on March 26, 2007, that he was living with Bird and that she was a convicted felon.[6] We conclude that a preponderance of the evidence supported the trial court's finding that Earlywine violated the conditions of his probation, and, thus, revocation of his probation was proper. See Ashcraft v. State, 716 N.E.2d 1278, 1280 (Ind. 1999) (holding that preponderance of the evidence established that defendant knew he was driving a vehicle with a suspended license so as to justify revocation of his probation).

II.

The next issue is whether the trial court abused its discretion by ordering Earlywine to serve his suspended sentence. Earlywine contends that the trial court erred

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[6] Earlywine argues that, because he had admitted that he was living with a convicted felon at a hearing on March 26, 2007, the trial court "should be estopped" from later revoking his probation on that ground. Appellant's Brief at 13. Earlywine fails to develop this argument or cite to authority. Therefore, Earlywine has waived this argument. See, e.g., Flynn v. State, 702 N.E.2d 741, 744 (Ind. Ct. App. 1998) (holding that the defendant waived his argument by failing to present a cogent argument or cite to authority), reh'g denied, trans. denied.

by not considering alternatives to incarceration. We review a trial court's sentencing decision in probation revocation proceedings for an abuse of discretion. Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Smith v. State, 730 N.E.2d 705, 708 (Ind. 2000), reh'g denied.

Ind. Code § 35-38-2-3(g), which gives a trial court sentencing options if the trial court finds a probation violation, provides:

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:
>
> (1) continue the person on probation, with or without modifying or enlarging the conditions;
>
> (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
>
> (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

We have held that "so long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence." Goonen, 705 N.E.2d at 212. The "[c]onsideration and imposition of any alternatives to incarceration is a 'matter of grace' left to the discretion of the trial court." Monday v. State, 671 N.E.2d 467, 469 (Ind. Ct. App. 1996).

Here, the trial court sentenced Earlywine to thirty-six months with thirty months suspended. On November 9, 2006, the State filed a Notice of Violation of Probation

alleging that Earlywine had violated the conditions of his probation by submitting a urine specimen that tested positive for the presence of Cannabinoids, "Oxazipan," and Temazepam. Appellant's Appendix at 18. On January 8, 2007, Earlywine admitted the violation, and the trial court placed him back on probation. That same month, the State filed another Notice of Violation of Probation, and the trial court later properly found that Earlywine had committed domestic battery, had associated with convicted felons, and had consumed alcohol while on probation. Given Earlywine's numerous violations of probation, we cannot say that the trial court abused its discretion by ordering him to serve his suspended sentence of thirty months in the Indiana Department of Correction. See Abernathy v. State, 852 N.E.2d 1016, 1022 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion by ordering defendant to serve his suspended sentence).

For the foregoing reasons, we affirm the revocation of Earlywine's probation.

Affirmed.

BARANES, J. and VAIDIK, J. concur